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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1172

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORPORATION,
Petitioners,

vs.

FORTNER ENTERPRISES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this action on December 16, 1971.

Opinion Below

The opinion of the Court of Appeals, reported at 452 F.2d 1095, appears in Appendix A. No opinion was rendered by the District Court for the Western District of Kentucky.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. When a supplier's credit subsidiary extends financing conditioned upon the purchase of the supplier's products, is there a *prima facie* case requiring submission to a jury

(a) of an alleged *per se* tying violation where the fungible tying element (credit or money) is claimed to be unique solely because offered on cheaper, more favorable terms than available elsewhere, but where there is a failure to show that those terms reflect any unique economic advantage over other lenders because, as the Court of Appeals found, the record is barren of evidence that (1) legal prohibitions or (2) higher costs and lower profitability barred any competing lenders from granting credit on the same or equally cheap terms, or

(b) of any other alleged Sherman Act violation, measured by the rule-of-reason, where, *inter alia*,

(1) the record fails to show that the challenged financing was offered on predatory, below-cost terms;

(2) the record fails to show that other lenders were unable to give equally favorable terms (in fact, they were stimulated to do so);

(3) the record fails to show that the challenged financing was conditioned upon exclusive dealing (in fact, even the credit granted could be refinanced to allow the purchase of competing products);

(4) the record fails to show that the supplier's competitors were foreclosed because of the challenged financing (in fact, while total sales nationally and those of competitors with larger sales increased, the supplier's sales declined from 1.4% to .8% of the total);

(5) the record fails to show that the relevant market should be limited to a single city and to the selfsame products as those of the supplier; and

(6) the record fails to show that the supplier had any specific intent to achieve monopoly or posed a dangerous probability of doing so?

2. Does mere proof of the acceptance of a tie-in by customers establish the standard of "sufficient economic power" essential to the *per se* tying rule?

Statutes Involved

The applicable statutes are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. They provide in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • •."

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Statement of the Case

In this treble damage antitrust action brought under Section 4 of the Clayton Act (14 U.S.C. §14), violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) are alleged in that United States Steel Corporation and its wholly owned subsidiary, U. S. Steel Homes Credit Corporation, forced the respondent and others to purchase prefabricated houses from U. S. Steel's Homes Division as a condition to obtaining financing. (JA 38-76, 103-32*)

Fortner Enterprises claims that it and others were "coerced" by "economic necessity" to buy houses, later found to be defective, at artifically high prices because the land financing furnished by the Credit Corporation was not available from any other source on as favorable terms (*i.e.*, loans equivalent to 100% of the cost of the land). Such a "tying arrangement," respondent argues, constituted a *per se* violation of the Sherman Act. Alternatively, if it is not a *per se* offense, the arrangement is alleged nonetheless to have violated Sections 1 and 2 of the Act.

At an earlier stage of this litigation, the District Court for the Western District of Kentucky granted summary

* "JA" references are to portions of the record printed in the parties' Joint Appendix filed with the Court of Appeals and transmitted to the Clerk of this Court. Throughout this petition, all emphasis in quoted passages has been added unless otherwise noted.

judgment dismissing the complaint. (293 F. Supp. 762) The Court of Appeals for the Sixth Circuit affirmed without opinion. (404 F.2d 936) This Court granted certiorari and held, in a five-to-four decision, that Fortner was entitled to a trial of its claims.* (No. 306, Oct. Term, 1968)

Following a full trial, both sides moved for directed verdicts. Without opinion or any statement of its reasons, the District Court directed a verdict for respondent on the liability issues. (JA 196-99, 1016-58) Instructed that single damages could not exceed $250,000, the jury returned a verdict of $93,200 before trebling. (JA 196-99, 1063-72, 1076-77)

Petitioners limited their appeal to the liability issues, contending that respondent had failed to prove a *prima facie* case of any Sherman Act violation and, alternatively, that it was error to direct a verdict for the respondent. The Court of Appeals held that respondent had "made out a *prima facie* case of Sherman Act violations," but it reversed the judgment of the trial court insofar as it granted Fortner's motion for a directed verdict. The case was remanded for a new trial before a jury solely on the question of whether there has been a violation of Sections 1 and 2. (App. A, pp. A4, A18-A19)

For the purposes of this petition, the opinion of the Court of Appeals sufficiently outlines the transactions between the parties. (App. A, pp. A6-A8) In addition, respondent's principal testified that he would not have purchased the Homes Division's houses without the 100% land loans by the Credit Corporation and that such financing

* *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969).

was not available from any other source. The president of the largest mortgage company in Louisville testified that this was true at the time of the loans to respondent. He testified that it was not until almost a year after the second loan to respondent that his company, other mortgage companies, and building and loan associations in Louisville began offering 100% land financing in response to the competition of the Credit Corporation and other manufacturers of prefab homes or their affiliates. Respondent asked the trial court to take judicial notice of legal prohibitions upon the granting of 100% land financing by national banks and federally insured savings and loan associations. Finally, respondent's construction superintendent testified as an expert that in his opinion the price of the Homes Division houses exceeded by some $450 the cost of a local competitor's prefab house or of conventional building materials, both supplemented to the extent necessary to make them comparable.*

Reasons for Granting the Writ

I

A. The decision below conflicts with this Court's mandate in this case as to the requisite proof of "sufficient economic power" where credit is the tying element in an allegedly *per se* violation.

Justice Black's majority opinion in this case carefully analyzed the standard of "sufficient economic power" essential to the *per se* tying rule. Dealing first with the situation where the tying product itself is unique, the opinion reiterated the teaching of *United States* v. *Loew's Inc.*, 371

* JA 227, 421-22, 432, 821-23, 830-41, 839-44, 847, 868-69.

U.S. 38, 45 (1962): "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." (394 U.S. at 503)

Specifying some degree of "appreciable economic power" over the tying element as necessary, however, the majority equated the requisite power with that enjoyed by a seller of a product sufficiently unique and desirable to force at least an "appreciable number of buyers" to accept a "higher price because of their stronger preferences for the product." Rather than forcing those buyers to accept a premium price, Justice Black explained, such a seller can choose instead to force them to accept a tying arrangement, thereby forgoing his abnormal profits in the tying market to distort or "prevent free competition for their patronage in the market for the tied product." A seller shown to have the ability to choose between those two alternatives has "sufficient economic power" to invoke the *per se* tying rule.*

* "Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices. * * *. Market power is therefore a source of serious concern for essentially the same reason, regardless of whether the seller has the greatest economic power possible or merely some lesser degree of *appreciable economic power*. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—*can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product.* Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." (394 U.S. at 503-504)

Justice Black dealt also with the "somewhat confusing" case where the tying product itself is not unique or distinctive and sufficiently desirable to command a premium price but where the seller's economic power arises instead from his unique "cost advantage in producing it"—an advantage permitting him (like the seller of a distinctive product who is able to command a premium price) either to realize higher than normal profits or to distort competition in some other market by imposing a tie-in:

> "Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, *e.g., International Salt; Loew's,* or physical, as when the product is land, *e.g., Northern Pacific.* It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." (394 U.S. at 505, n. 2)

This Court recognized that money is a non-distinctive, fungible commodity* and, therefore, that there could be nothing unique about the petitioners' financing other than its "cheap terms" or low cost to the borrower.** Con-

* Justice Black stated that "money is a fungible commodity— like wheat * * *." (394 U.S. at 509) Justice White asserted that "money [is] the most fungible item of trade since it is by definition an economic counter * * *. The [tying] market here is money, a completely fungible item." (*Id.* at 515, 519)

** See 394 U.S. at 504 ("* * * no such financing was available to his corporation on any such cheap terms from any other source * * *."); *id.* at 505 ("They could well mean that U. S. Steel's subsidiary Credit Corp. had a unique economic ability to provide 100% financing at cheap rates."); *id.* at 515 ("There was nothing unique about U. S. Steel's money except its low cost to [plaintiff].").

sequently, the majority held that economic power over the tying element could be established only by proof (1) that the Credit Corporation had a cost advantage and higher profitability not enjoyed by other lenders or (2) that other lenders were prohibited by law from offering equally cheap financing. (394 U.S. at 505-506, 509)

In applying the standards of the *per se* rule to this case, the Court of Appeals found that the issue "raised regarding the second standard, that of 'sufficient economic power,' is far more troublesome * * *." The court emphasized its difficulty with this issue, stating that "In other Supreme Court cases * * *, this question did not pose the same factual uncertainty as here." (App. A, p. A11). Significantly, the Sixth Circuit concluded that this Court, in reviewing this case, had "refused to specify precisely what proof would satisfy the [market power] standard of the *per se* rule." (App. A, p. A11). Petitioners submit that this reading of Justice Black's opinion is mistaken and resulted in the erroneous conclusion below that respondent was entitled to go to a jury on the issue of economic power.

The Court of Appeals believed that the two sources of economic power over credit specified by Justice Black were not the only possible sources of such power. The court stated:

> "It was apparently the view of the [Supreme] Court that * * * [Fortner] must prove that the 'unique and unusual' terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The Court pointed to *two possible* sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competi-

tors in the relevant credit market in Louisville. *The Court did not preclude the possibility of other sources of leverage.*" (App. A, p. A13)

This Court's opinion and economic logic, however, compel the conclusion that a lender could have economic power in a credit market populated by many lenders only if he enjoyed one or both of the advantages articulated by Justice Black.

The Sixth Circuit's misconception of this Court's mandate on the proof of power over credit is evidenced by its failure to explain how Fortner had established a *prima facie* case as to this standard. That failure is underlined by the fact that the Court of Appeals offered the trial judge no guidance as to what instructions to give the jury. To the contrary, rather than leaving to the jury merely disputed fact issues,* its normal province, the opinion below appears to thrust upon the jury the essentially insuperable burden of deciding matters of the utmost economic complexity for laymen, *i.e.*, what evidence from a voluminous antitrust record is germane to determining whether the Credit Corporation had power over financing not enjoyed by competing lenders.**

* On the issue of the Credit Corporation's economic power over credit, for the purposes of this petition petitioners do not dispute any fact of record upon which respondent has relied, read in the light most favorable to and drawing every reasonable inference for respondent.

** The Court of Appeals stated, in part: "We have not undertaken in this opinion to discuss all of the items of evidence bearing upon the question of economic power. * * * Upon remand, these items [urged by Fortner] and the entire range of evidence bearing upon this issue should be submitted to the jury. * * * On this aspect of the case, the issue for the jury is whether the Credit Corporation, in the language of *Northern Pacific Railway Co., et al.* v. *United States, supra*, had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. * * *' Admittedly this is a standard which must vary in application from case to case, but *the jury should be free to determine the issue on the basis of the entire evidence* (some of which we have commented upon), *free from the limitations of an arbitrary definition.*" (App. A, p. A19, n.4)

In addition to the failure to explain how a *prima facie* case had been established, the decision below is anomalous in that the court's own factually correct analysis of the record demonstrates affirmatively that respondent did not make out a *prima facie* case of economic power within the standards mandated by this Court. When it turned to the only two possible sources of power over credit, as specified by Justice Black, the Court of Appeals concluded that the record was devoid of evidence as to either.

First, the court found that apart from legal restrictions against 100% land loans by national banks and federally insured savings and loan associations the record is "barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, and insurance companies." Further, even as to the only two types of lenders legally barred, the Court of Appeals correctly concluded, "Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be insufficient to establish the fact that it is unable to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower."* (App. A, pp. A13-A14)

* That credit or financing is cheaper or more favorable than available elsewhere cannot be determined by considering only the percentage or ratio of the amount loaned in relation to the security or collateral. Other relevant factors include the rate of interest charged, whether or not the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. For example, a 100% loan against security valued at $1,000 but discounted 10% (*i.e.*, reducing the amount actually taken by the borrower to $900) and at 10% interest repayable in 12 equal monthly installments is not cheaper or more attractive than a 90% loan against the same security, without discount or fee and at 5% interest repayable at the end of 12 months.

Second, as to any cost advantage over other lenders, the Court of Appeals found initially that "the Credit Corporation, while not operating at a loss, had comparatively low profits. Its total net profits in 1960 and 1961 were $52,197.00 and $59,053.00, respectively. In those same years its earnings in relation to net worth were 4.5% and 4.8%. At least two local mortgage companies in Louisville had higher earnings in relation to net worth in both of these years." (App. A, p. A15) Even more important, however, and conclusive by itself that respondent was not entitled to go to a jury on this issue was the court's indisputable finding that:

> "There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation." (*Id.*)

Moreover, apart from this failure of proof, the record shows affirmatively and without contradiction that other lenders were not precluded from matching the Credit Corporation's terms by any supposed cost advantage it might have. Thus, based upon the uncontradicted testimony of respondent's own witnesses that the Credit Corporation and others stimulated a competitive response,* the Court of Appeals noted "that soon after plaintiff negotiated its financing terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis."** (App. A, p. A14)

* JA 821-23, 839-40, 842-44, 847.

** The Court of Appeals discussed various facts and contentions urged by Fortner as proof of economic power (*e.g.*, the rates at which the Credit Corporation borrowed the funds it loaned, the Homes Division's guaranty of the loans extended to Fortner and certain others, and the allegedly higher-than-competitive prices of the houses pur-

That respondent failed to make even a *prima facie* showing that the Credit Corporation enjoyed "sufficient economic power" over credit is not surprising. If in fact petitioners had any economic power over credit, they would hardly have limited the Credit Corporation's financing activities just to supporting the modest volume of business in prefabricated houses done by U.S. Steel's Homes Division.* Rather U.S. Steel would have devoted to the business of financing more of its assets than the $1 million capital and $1 million loan it extended to the Credit Corporation and would have made credit available far more generally in order to reap the higher-than-normal profits which are the hallmark of the economic power essential to proof of a *per se* tying violation.

B. The decision below conflicts with this Court's mandate in this case and its other decisions as to the requisite proof, by the rule-of-reason standard, of any other Sherman Act offense upon Fortner's failure to establish a *per se* tying violation.

As in the case of the alleged *per se* tying violation, the Court of Appeals did not explain how respondent had made out a *prima facie* case of any other Sherman Act violation:

chased by Fortner). The court found that none of these necessarily proved economic power but concluded that nevertheless they should be submitted to a jury. (App. A, pp. A15-A17) As analyzed in the briefs filed by petitioners below and transmitted to this Court, all of those facts, considered individually or in the aggregate and read in the light most favorable to respondent, fail to make out a *prima facie* case of economic power over credit, because the record, read in its entirety, lacks any evidence that the Credit Corporation had any unique cost advantage and higher profitability or that other lenders were legally barred from offering financing on identical or equally cheap terms.

* In 1960, the Homes Division sold 1,793 houses for $6,746,353. In 1961, it sold 1,342 houses for $5,051,992. (JA 1199)

"While the plaintiff claims a violation of Sec. 2 of the Sherman Antitrust Act, we do not deem it necessary to discuss the evidence on this question since it consists substantially of the same evidence offered in support of the alleged Sec. 1 violation. We are satisfied that the total evidence, measured in terms of the principles enunciated by the majority opinion of the Supreme Court on the first appeal, make it inappropriate for the Court to approve a directed verdict for either party in this case on the liability issues under Secs. 1 and 2 of the Sherman Act." (App. A, pp. A17-A18)

Patently the Sixth Circuit misconstrued this Court's decision on this aspect of the case, too. This Court enunciated no principles other than in connection with Fortner's *per se* tying contentions. To the contrary, Justice Black's majority opinion states, "We need not consider, however, whether [Fortner] is entitled to a trial on this more general theory [*i.e.*, the more thorough rule-of-reason standard], for it is clear that [Fortner] raised questions of fact which, if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine." (394 U.S. at 500-501)

Respondent's failure to prove even a *prima facie* case of any *per se* violation placed a far heavier burden upon it to establish a *prima facie* case of any other violation. As this Court emphasized in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958), where the *per se* rule is applicable it "* * * avoids the necessity for an incredibly complicated and prolonged economic investigation * * * to determine at large whether a particular restraint has been unreasonable * * *." Similarly, Justice Black in this case stated that absent proof of a *per se* tying violation, where

"no specific showing of unreasonable competitive effect is required," a plaintiff could prevail only by proving, "on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated." (394 U.S. at 498, 500) Because Fortner relies, as the court below noted, upon "substantially * * * the same evidence offered in support" of its Section 1 *per se* tying allegations, its claims based upon the rule-of-reason standard fall *a fortiori*.

The record demonstrates that, contrary to the rule-of-reason standard mandated by this Court in the event of a failure to establish a *per se* tying violation, respondent has failed to make out a *prima facie* case of any other Sherman Act violation. Tying arrangements are deemed evil only when the seller enjoys power in the tying market and, by imposing the tie, uses that power to distort competition on the merits in the tied market. Absent economic power over credit (as to which Fortner has failed to make a *prima facie* case), financing claimed to be unique solely because offered on cheaper terms is nothing more than a promotional device enhancing competition in the tied product market. The price of the tied product, here houses, is for all effects and purposes reduced when the tying credit is sold at lower than prevailing prices. Justice Black and the majority of this Court recognized that, like the offer of any other tying product on advantageous terms, "advantageous credit terms may be viewed as a form of price competition in the tied product * * *." They concluded that a seller can achieve that objective as long as he offers "fringe benefits over which he has no economic power." (394 U.S. at 508 and n. 5)

Respondent can not claim that either the Credit Corporation or U.S. Steel used their assets to engage in predatory conduct by offering credit at below-cost prices, because the record is devoid of such evidence. There is no proof that other lenders were unable to offer terms equally favorable to those of the Credit Corporation. Instead the record shows, without contradiction, that normal lending sources even in Louisville responded to the Credit Corporation's 100% land financing by matching it. It can not be argued, therefore, that the Homes Division's competitors in the house market are foreclosed since (even if they are unable or choose not to grant such financing) their customers can turn to independent financing sources for the same or comparable terms.

The respondent was required to place Homes Division houses only upon the lots financed by the Credit Corporation and only as long as the money furnished to acquire and develop those lots was not repaid.* There is no evidence or even claim that petitioners conditioned their financing more broadly upon the purchase of their houses exclusively. While the lots financed by the Credit Corporation were to be used (unless the money advanced was repaid) only for the Homes Division's houses, Fortner and all others were free to use their own money or that borrowed from any other lender to buy as many houses as they chose from U.S. Steel's competitors. Further, there is no evidence that any competitor in the housing market failed to sell a single house or that any buyer other than possibly Fortner failed to purchase any houses from competitors because of petitioners' financing. The sole evidence is that the Homes Division had been losing and continued to lose

* As the Court of Appeals found, "* * * Fortner was advised that he was free to refinance the Credit Corporation's loan and proceed to obtain houses from other sources." (App. A, p. A8)

sales (dropping from 1.4% to .8% of national prefab sales) while the total number of prefab houses sold by all manufacturers increased more than 20% and the sales of all but one of the Homes Division's larger competitors significantly increased.*

Moreover, Fortner neither argued nor does the record show what the relevant market is for measuring any allegedly adverse competitive effect or monopoly (*e.g.*, no basis is shown for limiting the geographic dimensions of the market to Louisville or its product definition to prefab houses in any particular price category as opposed to all houses). Finally, as to the Section 2 claim, unlike the offense of monopolization, a conspiracy to monopolize (*i.e.*, to acquire monopoly power—the power to control price and exclude competition) requires not just the "deliberateness" to do the acts challenged but a specific intent to accomplish the unlawful result of monopolization, as in driving competitors out of business, together with the dangerous probability of achieving monopoly in the relevant market.** The record here is barren of any such evidence.

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* By comparison, competing prefab manufacturers sold the following number of houses (JA 884-85, 1199):

Year	*National Homes*	*Swift Industries*	*Inland Homes*	*Kingsbury Homes*	*Homes Division*
1960	16,804	2,500	2,281	1,401	1,793
1961	18,276	3,000	2,253	2,150	1,342

** *American Tobacco Co.* v. *United States*, 328 U.S. 781, 786, 789 (1946); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 229-230 (1947); *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Griffith*, 334 U.S. 100, 105 (1948); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Cornwell Quality Tools Co.* v. *C.T.S. Company, Inc.*, 446 F.2d 825, 832-833 (9th Cir., 1971), *cert. denied*, —— U.S. ——, 40 U.S. Law Week 3336 (1972); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir., 1961); *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 306 F.2d 61, 64 (3rd Cir., 1962).

In summary, considering the entire record in the light most favorable to respondent, it has failed, contrary to the conclusion of the court below, to establish a *prima facie* case of any Sherman Act violation.

II

The decision below conflicts with the decision of another court of appeals as to the requisite proof of "sufficient economic power" whether the tying element is credit or any other product.

The decision below creates a direct conflict with the decision of another court of appeals as to how "sufficient economic power" may be proved. Fortner relied below upon *Advance Business Systems & Supply Co.* v. *SCM Corporation*, 415 F.2d 55 (4th Cir., 1969), *cert. denied*, 397 U.S. 920 (1970), claiming that on the question of economic power the verdict directed in its favor was justified without more on principles asserted in that decision.

There the Fourth Circuit construed this Court's decision in this case as standing for the proposition that "* * * the 'sufficient economic power' test of *per se* illegality is satisfied when it appears that the seller has the power to 'impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.' "*

* Petitioners submit that the Fourth Circuit failed to read the language it quoted in the context of Justice Black's detailed discussion of the fact that market power generally involves a seller's ability to raise the price of his tying product at least to some customers because they regard that product as sufficiently unique and desirable to pay a premium over the price of what they deem to be the nearest substitute. (394 U.S. at 503-504) In omitting the crucial sentence preceding its quotation out of context from Justice Black's opinion, the Fourth

(415 F.2d at 68) The Fourth Circuit, in the context of the Clayton Act, also held that "a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product." (*Id.* at 62) In the decision below, the Sixth Circuit (correctly, petitioners believe) has rejected the Fourth Circuit's conclusion that "the acceptance of the tie-in by customers without more is proof of economic power." (App. A, p. A18)

The conflict between the Fourth and Sixth Circuits is significant because the answer to the question whether market power can be found from the mere fact that customers accept a tie-in encompasses all tying arrangements, not merely those where credit or financing is the tying element. While the Sixth Circuit's negative answer to that question is in favor of petitioners, resolution of the conflict by this Court is necessary to insure proper application of the *per se* tying rule in the future since the Fourth Circuit's view in effect eliminates the need to prove even the most minimal degree of power over the tying product.

The Fourth Circuit's view not only destroys the rationale for the existence of the *per se* tying rule (*i.e.*, that power enjoyed in the tying product market should not be extended to restrain trade in another market by insulating the tied

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Circuit failed to note his statement that if the seller had the power to raise the price of his tying product and "could therefore choose instead to force [buyers] to accept a tying arrangement," then the requisite economic power would be shown and, "Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." (*Id.* at 504) Justice Black did not say or imply that acceptance of a tie-in by customers proves economic power.

product from competition "on the merits") but also disregards the fact that buyers, as in this case, will accept a tie-in when the seller offers the tying product on cheaper or more favorable terms as a "loss leader" to promote the sales of his tied product. As this Court held, the lower price of the tying product, without more, fails to prove any power in the tying market, and without such power a promotional tie-in of this type is tantamount to a reduction in the price of the tied product and constitutes lawful price competition in that market. (394 U.S. at 505, 508)

III

The decision below raises significant and recurring problems of great moment to the general economy concerning supplier financing as affected by the antitrust laws and emphasizes the need for clarification of this Court's prior five-to-four decision, which has occasioned substantial controversy and uncertainty.

The importance of this case far transcends just the resolution of the dispute between the parties here. The majority and dissenting opinions of this Court when it first reviewed this matter all recognized that financing conditioned upon the purchase of a lending seller's goods is a widespread and significant phenomenon in the nation's economy, one which has promoted competition and the advent of small, independent businesses, not just in connection with the burgeoning franchise phenomenon but elsewhere as well. (394 U.S. at 507, 511, 515-516) Justice White stated:

> "A seller who is willing to take credit risks which no one else finds acceptable is simply engaging in the

hard and risky competition which it is the policy of the Sherman Act to encourage. And if he may not do so, then those businesses and entrepreneurs who depend for their survival and growth or for the initiation of new enterprises on the availability of credit financing from sellers may well fail for lack of credit availability from other sources." (*Id.* at 517)

Justice Fortas said:

> "It is common in our economy for a seller to extend financing to a distributor or franchisee to enable him to purchase and handle the seller's goods at retail, to rent retail facilities, to acquire fixtures or machinery for service to customers in connection with distribution of the seller's goods, or, as here, to prepare the land for and to acquire and erect the seller's houses for sale to the public. * * * Arrangements of this sort run throughout the economy. They frequently, and perhaps characteristically, represent an indispensable method of financing distributive and service trades. * * *" (*Id.* at 524-525)

As the court below noted, "The majority and minority opinions in this case have stimulated much general interest and wide scholarly examination." (App. A, p. A12) A partial listing of the many legal commentaries which have attempted to analyze this Court's prior decision is set forth in Appendix B. Those commentaries have reached sharply conflicting conclusions as to the meaning of the decision and what is necessary to prove a *per se* tying violation or other antitrust offense where supplier financing is challenged.

In addition, the decision has attracted widespread attention in the business community and has been character-

ized (incorrectly, petitioners believe) as substantially inhibiting if not precluding supplier financing and credit extended, at least if on favorable terms, to dealers and customers.* In fact, even the dissenting opinions expressed concern as to the possibly damaging impact of the Court's decision, Justice White noting that "The logic of the majority opinion * * * casts great doubt on credit financing by sellers" and Justice Fortas stating that the effect of the decision "may be vast and destructive," amounting to a use of "the antitrust laws themselves as an instrument in restraint of competition." (394 U.S. at 516, 524-525)

Petitioners submit that it is imperative that this Court review the decision below in view of the importance to the general economy of clear and correct guidelines for the proper application of the antitrust laws both in the vital area of supplier financing and in the broader realm of tying arrangements in general. Particularly is that true inasmuch as the decision below purports to be premised upon the prior decision of this Court—a decision which appears to be in need of clarification (see *SEC* v. *United Benefit Life Insur. Co.*, 387 U.S. 202, 207 (1967)) and which, decided three years ago by a five-to-four vote, has been a source of controversy and confusion ever since (see *Afroyim* v. *Rusk*, 387 U.S. 253, 255-256 (1967)).

* See, for example, the editorial entitled "Review and Outlook: A Peculiar Way to Preserve Competition," *The Wall Street Journal*, April 21, 1969, p. 18.

Conclusion

For these reasons and because the record, after a full trial on the merits, contains all of respondent's evidence so that the retrial ordered below will afford, at best, no better vehicle for review and clarification of the standards mandated by this Court and may result in an erroneous verdict by a jury improperly given issues of law rather than fact to resolve, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDICES

APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Sixth Circuit

No. 71-1194

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FORTNER ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

UNITED STATES STEEL CORPORATION and
UNITED STATES STEEL HOMES CREDIT CORPORATION,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Kentucky, Louisville Division

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Decided and Filed December 16, 1971.

Before: MILLER and KENT, Circuit Judges, and CECIL, Senior Circuit Judge.

MILLER, Circuit Judge. This is the second appeal in this private antitrust action.[1] At the first trial the district court granted summary judgment for the defendants, holding that petitioner had failed to raise any question of fact as to a possible violation of the antitrust laws. *Fortner Enter-*

1. The action was instituted by Fortner Enterprises, Inc. against U. S. Steel Corporation and its wholly owned subsidiary, the U. S. Steel Homes Credit Corporation, pursuant to Secs. 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2, seeking treble damages and injunctive relief against further violations.

prises, Inc. v. *U. S. Steel Corp., et al.*, 293 F.Supp. 762 (1966). The judgment was affirmed by this Court without opinion but the Supreme Court in a 5-4 decision, holding on the facts set forth in the record as it was constituted at that time, that summary disposition was improper and the action should go to trial, reversed the judgment of affirmance of this Court and remanded the action with directions that it proceed to trial. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495 (1969). The majority and minority opinions in this case have stimulated much general interest and wide scholarly examination.[2] Upon remand, the district judge, after a trial before a jury which occupied approximately one month, sustained the plaintiff's motion for a directed verdict and overruled the defendants' similar motion. He submitted to the jury only the question of damages which should be awarded in favor of the plaintiff. The jury returned a verdict in the amount of $93,200.00

2. We are aware of the controversy which surrounds the tying arrangement cases generally, a controversy involving differences over both economic policy (See, e.g. Markovitz, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 Yale L.J. 1397 (1967); Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957); and the proper application of legal doctrine (See, e.g. Kauper, *The Warren Court and the Anti-trust Laws: Of Economics, Populism and Cynicism*, 67 Michigan L.Rev. 325 (1968); Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW.L.Rev. 626 (1965). We have studied with interest and special care the scholarly comments which the Supreme Court's opinions in this case have generated, finding especially useful a note: *The Logic of Foreclosure: Tie-in Doctrine after Fortner* v. *U. S. Steel*, 79 Yale L.J. 86 (1969). See also, Dam, *Fortner Enterprises* v. *United States Steel: "Neither A Borrower, Nor A Lender Be,"* 1969 Supreme Court Review 1; *Recent Trends in Supreme Court Antitrust Decisions: Commentary — Past, Present and Future*, 38 Antitrust Law Journal 602 (1969); Note, *Credit As a Tying Product*, 69 Col.L.Rev. 1435 (1969); and The Supreme Court, 1968 Term, 83 Harv.L.Rev. 235.

which was trebled by the court. Motions for judgment n.o.v. and, alternatively, for a new trial were denied and judgment for plaintiff was entered on November 23, 1970. The defendants raise no question on the present appeal as to damages, having elected to limit the appeal to the issue of liability under the Sherman Act. Their insistence is that the court erred in directing a verdict in favor of the plaintiff and that, on the contrary, the court should have sustained the defendants' motion for a directed verdict. It is argued, in the alternative, that at least the case was one for the jury and that the action should be remanded for a new trial before a jury on the question of liability only, the damage issue already having been decided by a jury.

In its original and amended complaints the plaintiff charged that the defendants had engaged in a contract, combination, and conspiracy to restrain trade and to monopolize trade in the sale of prefabricated houses. Alleging that there was a continuing agreement between the defendants to force the plaintiff and other corporations and individuals, as a condition to availing themselves of the services of the Credit Corporation, to purchase at artificially high prices only U. S. Steel Homes, plaintiff specifically claimed that in order to obtain loans totaling over two million dollars from the Credit Corporation for the purchase and development of certain land in the Louisville, Kentucky, area, it had been required to agree, as a condition of the loans, to erect a prefabricated house manufactured by U. S. Steel Corporation on each of the lots purchased with the loan proceeds. It was further claimed

that the prefabricated materials were then supplied by U. S. Steel at unreasonably high prices and proved to be defective and unusable, thus requiring the expenditure of additional sums and delaying the completion date for the development.

To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. Where there is conflicting evidence or insufficient evidence to make only a "one way" verdict possible, a directed verdict is improper. *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 479-80 (1943); 5A *Moore's Federal Practice* ¶50.02[1] pp. 2321, 2. An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); 5A *Moore's Federal Practice*, ¶50.02[1] pp. 2326, 7.

Examining the record on the basis of these standards and in the light of the Supreme Court's opinion in this case, we find that while the plaintiff made out a prima facie case of Sherman Act violations the evidence and permissible inferences therefrom are in such conflict that neither party was entitled to a directed verdict. Instead the question of liability should have been submitted to the jury as well as the question of damages. Both the plaintiff and defendants to support their respective positions rely upon the Supreme Court's opinion in this case on the first appeal. In doing so they quote selective portions from the opinion which

tend to indicate some support for the particular views which they espouse. It becomes necessary, therefore, in the resolution of this appeal to examine the Supreme Court's opinion to discover its real thrust and impact in the context of the facts of the present litigation as they were developed at the second trial.

At the outset it is well to bear in mind that on the first appeal the Supreme Court was not considering the alleged antitrust violations in the light of a full trial on the merits. Rather the specific question before it was a procedural one, i.e., whether it was appropriate for the district court on the basis of the facts as they had been developed from affidavits and pretrial procedures to dispose of the case by summary judgment. That the Court did not intend to indicate any view as to what the trier of the facts should find from the evidence was expressly pointed out when the Court said that it might turn out that the plaintiff's allegations will not be sustained when the case goes to trial. "It may turn out," as the Court further stated, "that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such a conclusion as a matter of law, and it is not our function to speculate as to the ultimate findings of fact." It is also of significance that the Court indicated its reluctance to dispose of antitrust cases by summary procedure. Addressing itself specifically to the use of summary judgment procedure in antitrust cases, the Court stated: "Since summary judgment

in antitrust cases is disfavored, *Poller*,[3] *supra*, the claims of uniqueness in this case should be read in the light most favorable to petitioner." (Plaintiff).

It was developed at trial that the Homes Division of U. S. Steel manufactures component parts for prefabricated houses, selling what it terms home packages in various states. The sales are made through dealer-builders such as the plaintiff. U. S. Steel's subsidiary, the Credit Corporation, was founded in 1954 as a wholly owned subsidiary for the purpose of providing financial assistance to the Homes Division's dealer-builders who were unable to obtain suitable financial assistance from more conventional sources. In effect the services of the Credit Corporation were a "tool" to assist the Homes Division in the sale of its houses. Beginning in 1958 the policies of the Credit

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3. In *Poller* v. *Columbia Broadcasting Co., Inc., et al.*, 368 U.S. 464, 473 (1962), the Court in stating that summary procedures should be used sparingly in complex antitrust litigation used language which we think is of significance in determining the appropriateness of directing a verdict in this case rather than submitting the issues to a jury for evaluation:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Although summary judgment and a directed verdict are procedurally distinguishable both substitute the court for the jury as the fact-finder. Some of the considerations dictating a reluctance to resort to summary judgment in complex antitrust cases are equally applicable to the direction of a verdict.

Corporation were changed, when a program of "special assistance" was initiated whereby credit was made available in high risk situations on particularly reasonable terms to Homes Division dealer-builders. As reflected by the minutes of the U. S. Steel finance committee, the purpose of the policy was to enable Homes Division "to attain a minimum of 1800 units in 1959." To reach this goal and such additional distribution as may be feasible the Credit Corporation was directed to make loans to dealers without conformity to conventional or conservative patterns "but within the bounds of prudent business judgment." It was contemplated that Homes Division would underwrite such loans, guaranteeing losses to a defined extent.

In 1959 it came to the attention of the Homes Division that certain land in an existing subdivision in the Louisville, Kentucky, area might be available for development. The land was owned by a corporation in which A. B. Fortner, a successful and well-known real estate developer, held a 50% interest. Later in that year U. S. Steel initiated discussions with Fortner with the idea that the property might be an attractive vehicle for it to enter the Louisville prefabricated housing market. Following negotiations an agreement was reached whereby Fortner's wholly-owned corporation, Fortner Enterprises, Inc., would become a franchised dealer-builder of the Homes Division product. It was part of the agreement that the Credit Corporation would extend credit to the plaintiff corporation for the development conditioned upon the construction on each of the 187 lots purchased by the plaintiff [of] a prefabricated house from the Homes Division of U. S. Steel. The initial

loan was $2,055,300.00. Interest at the rate of six per cent per annum, plus a service charge of one-half of 1%, was to be charged. Of the total commitment, $373,200.00 was to cover the cost of acquisition and development of the lots; the remainder was to cover the purchase and construction of the houses. The land loan equaled 100% of the cost of the land acquisition and development.

There was evidence that the plaintiff experienced difficulties with the U. S. Steel products, including the omission of parts and the delivery of defective parts which necessitated additional work. Substantial complaints were made with respect to the Homes Division products from home owners who had purchased the homes from Fortner. Yet during this period Fortner requested additional financing for the purchase and development of land on which Homes Division houses were to be placed. Thus, on August 2, 1961, Fortner executed a land and mortgage note in the amount of $59,000.00 and a construction note in the amount of $403,400.00. Having continued to experience difficulties with the prefabricated houses and having run out of cash, Fortner requested that he be relieved of the requirement that the financing be used for the construction of Homes Division houses. This request was refused but Fortner was advised that he was free to refinance the Credit Corporation's loan and proceed to obtain houses from other sources. Thereafter, in July 1962 he instituted the present action.

In *Northern Pacific Railway Co., et al.* v. *United States,* 356 U.S. 1 (1958), the Supreme Court defined the tying arrangement device, identified its evils and stated the prerequisites for per se illegality in the following fashion:

Appendix A

For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594.

They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. *International Salt Co.* v. *United States*, 332 U. S. 392. Cf. *United States* v. *Paramount Pictures*, 334 U. S. 131, 156-159; *United States* v. *Griffith*, 334 U. S. 100. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell

> flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself. 356 U. S. at 5, 6 and 7.

Once it is established that a tying arrangement exists, it must be determined whether a "not insubstantial" amount of commerce is affected by the tie and whether the tier has "sufficient economic power" in the market for the tying product.

We need not deal at length with whether a "tying arrangement" exists in this case, nor whether the amount of commerce affected is "not insubstantial." The Court rejected Mr. Justice Fortas' argument that this was not a "tying arrangement":

> We agree with the District Court that the conduct challenged here primarily involves a tying arrangement of the traditional sort. 394 U.S. at 498.

On the matter of whether the volume of commerce allegedly foreclosed was "not insubstantial" the Court stated:

> The complaint and affidavits filed leave no room for doubt that the volume of commerce aliegedly foreclosed was substantial. It may be true, as respondents claim, that petitioner's annual purchases of houses from U. S. Steel under the tying arrangement never exceeded $190,000, while more than $500,000 in annual sales was involved in the tying arrangement held illegal in *International Salt, but we cannot agree with respondents that a sum of almost $200,000 is paltry or "insubstantial."* 394 U.S. 501, 2. (Emphasis added).

The issues raised regarding the second standard, that of "sufficient economic power," is far more troublesome, but we think that so far as the present record reflects, the issue should have gone to the jury. Of this issue, Mr, Justice Black stated that "* * * the pleadings and affidavits sufficiently disclose the *possibility* of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue." (Emphasis added.)

In other Supreme Court cases in which a "tying arrangement" has been found to be illegal per se under the Sherman Act, this question did not pose the same factual uncertainty as here. Sufficient economic power was shown in *International Salt Co.* v. *United States,* 332 U.S. 392 (1947), by the simple fact that the tying product was patented; in *United States* v. *Loew's, Inc.,* 371 U.S. 38 (1962), the tying product was copyrighted; and in *Northern Pacific Railway Co., et al.* v. *United States,* 356 U.S. 1 (1958), it was the physical uniqueness of the land which constituted the tying product.

Here no such talisman exists. The Court rejected Fortner's "apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" Having done so, however, the Court refused to specify precisely what proof would satisfy the standard of the per se rule. Yet the Court was not entirely silent as to the sort of proof which could be weighed in determining the existence of the necessary "economic power" in the tying product.

Under the antitrust statutes, the tying cases are fundamentally based on the notion that competitive advantage in

one market (that of the tying product), whether the result of a patent, copyright, physical uniqueness, a cost advantage or whatever else might serve as a source of leverage, should not be translateed into a competitive advantage in another distinct market (that of the tied product).

The focus of our present inquiry is whether the Credit Corporation possessed leverage in the credit market (the "tie" here being the extension of credit) sufficient to induce buyers in the market for prefabricated houses (the "tied" product) to accept a less competitive product.

It is clear that such leverage need not be of sufficient magnitude to constitute monopoly power or even market dominance. As stated in the majority opinion in this case:

> The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market. See, *e.g.*, *International Salt; Northern Pacific; United States* v. *Loew's Inc.*, 371 U.S. 38 (1962). 394 U.S. at 502, 3.

And in *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962), the Court stated:

> • • • Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. 371 U.S. at 45.

Appendix A

As we have pointed out, the Court expressly rejected Fortner's "apparent" argument that the uniqueness of the loan, namely the fact that one hundred per cent land financing may have been unavailable elsewhere in Louisville at the time the loan commitment was made, alone constitutes proof of "sufficient economic power." It was apparently the view of the Court that, while plaintiff need not prove dominance in the credit market on the part of the Credit Corporation, it must prove that the "unique and unusual" terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The Court pointed to two possible sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville. The Court did not preclude the possibility of other sources of leverage.

Turning to the evidence with respect to these two possible sources of economic power suggested by the Supreme Court, judicial notice may be taken of the fact that national banks may make loans only on improved real estate, and that federally insured savings and loan associations are limited to loans up to 70% of the real estate as developed. Yet the record appears to be barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, and insurance companies. A jury should be permitted to evaluate the

significance of the freedom of such traditional lending sources from any restriction against extending 100% financing in deciding whether competitors in the Louisville credit market were precluded from offering credit on such terms. On the same facet of the case there was testimony at trial that soon after plaintiff negotiated its financing terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis. Such fact, while not conclusive of the situation as it existed at the time plaintiff's loans were consummated, could be appropriately considered by a jury in reaching the ultimate conclusion whether the Credit Corporation had economic power in the credit market so as to come within the per se rule. Further, while the plaintiff offered some evidence that 100% financing was not generally available on the Louisville market at the time of its financing with the Credit Corporation, it must be conceded that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors, as appropriately pointed out by the defendants, include the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be insufficient to establish the fact that it is unable to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower.

As to the second factor suggested by the majority opinion (that of a possible cost advantage) we again find that the record is open to varying interpretations, inferences and conclusions. It is true that the Credit Corporation as a wholly owned subsidiary of U. S. Steel was able to obtain funds for lending purposes at the prime rate, and that U. S. Steel necessarily stood behind repayment of any funds which the Credit Corporation was required to borrow. Also, as a subsidiary of U. S. Steel, it may be inferred that the Credit Corporation was not expected to maximize profits but to assist in the sales of the Homes Division houses. During the relevant period no dividends were paid to the parent corporation and there is no evidence that the Credit Corporation competed aggressively as a lender. These considerations could conceivably be taken by a jury as some evidence that the Credit Corporation was able to make loans at a level of risk unacceptable to most lending institutions. On the other hand, the record justified the conclusion that the Credit Corporation, while not operating at a loss, had comparatively low profits. Its total net profits in 1960 and 1961 were $52,197.00 and $59,053.00, respectively. In those same years its earnings in relation to net worth were 4.5% and 4.8%. At least two local mortgage companies in Louisville had higher earnings in relation to net worth in both of these years. There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation. Of course, the Credit Corporation, as the evidence demonstrated, incurs the usual operating costs of a lending institution, including clerical and management

salaries, rent, charges for office equipment, supplies, services, taxes, etc. Moreover, it would be relevant for the jury to take into account that the Credit Corporation operates at some disadvantage in that traditional lending agencies doing business in a community on a continuing basis serve a concentrated geographic area having a larger and more diversified clientele of borrowers permitting them to achieve cost savings and efficiencies not available to a lender engaged in a business like that of the Credit Corporation. It is also possibly true that traditional lending institutions are in position to spread their risks and costs both over a larger volume of business and over different areas of the economy.

The Credit Corporation obtained its funds primarily from banks. In 1961 it had borrowed from banks approximately ten to fourteen million dollars. For the borrowing of these funds it paid the prime rate. On the funds which it borrowed from U. S. Steel it paid the prime rate plus one per cent. It may be that the jury could infer from the record that the Credit Corporation incurred higher costs in acquiring money to lend than the costs incurred by commercial banks, savings and loan associations and insurance companies. In this connection it must be remembered that we are here dealing not with advantages which a finance subsidiary may give to its parent in relation to competitors in the parent's line of business, but with the question whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market.

Plaintiff also points to the fact that the Homes Division guaranteed or underwrote the land financing extended to plaintiff and certain others. It is argued that this fact demonstrates economic power over credit. This conclusion, in our view, is not necessarily true. On the contrary, it may simply be a factor which demonstrates that it was necessary for the Credit Corporation to be subsidized against any loss incident to the greater cost and risk involved. Doubtless other lending institutions in the relevant market were of sufficient strength and soundness to inspire confidence in their loan commitments.

Plaintiff's reference to the Supreme Court majority's statement in regard to the Homes Division houses being priced some $400.00 higher than comparable houses would not appear to have any conclusive effect on the question which we are now considering. It is clear from the opinion that Mr. Justice Black and those justices who joined him in the majority opinion did not reach any definitive conclusion as to the effect of this factor. On the contrary, as pointed out, they merely said that a substantial price differential "may suggest" or is not inconsistent with the "possibility of market power." The evidence on this question should be weighed by the jury and its proper probative value determined.

While the plaintiff claims a violation of Sec. 2 of the Sherman Antitrust Act, we do not deem it necessary to discuss the evidence on this question since it consists substantially of the same evidence offered in support of the alleged Sec. 1 violation. We are satisfied that the total evidence, measured in terms of the principles enunciated by the

majority opinion of the Supreme Court on the first appeal, make it inappropriate for the Court to approve a directed verdict for either party in this case on the liability issues under Secs. 1 and 2 of the Sherman Act.

In *Advance Business Systems & Supplies Co.* v. *SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the Court, as the plaintiff argues, interpreted *Fortner* as holding that "* * * the 'sufficient economic power' test of per se illegality is satisfied when it appears that the seller has the power to 'impose other burdensome terms such as a tie-in with respect to any appreciable number of buyers within the market.'" Plaintiff in its brief relies upon this interpretation and insists that the directed verdict in its favor was justified on the basis of this interpretation of *Fortner* by the Fourth Circuit. As we read the majority opinion in *Fortner*, the holding was that a tying arrangement achieves an unlawful restraint when "the seller can exert some power over some of the buyers in the market." The majority opinion did not hold that the acceptance of the tie-in by customers without more is proof of economic power. If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of economic power in the tying product set forth in other portions of his opinion.

The judgment of the district court insofar as it sustained the plaintiff's motion for a directed verdict is accordingly reversed, and the action is remanded to the district court

for trial before a jury on the question of liability under Secs. 1 and 2 of the Sherman Act. The judgment is affirmed insofar as it denied the defendants' motion for a directed verdict.[4]

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4. We have not undertaken in this opinion to discuss all of the items of evidence bearing upon the question of economic power. Plaintiff relies heavily, for example, upon evidence tending to indicate that the Credit Corporation was both able and willing to lend to high risk borrowers at a rate of interest commensurate with a much lower level of risk, i.e., to offer credit on terms otherwise unavailable at the time. The guarantees and the Credit Corporation's relationship to U. S. Steel are pointed to as possible sources of leverage. Upon remand, these items and the entire range of evidence bearing upon this issue should be submitted to the jury. Insofar as the complaints allege a per se violation due to a tie-in, assuming that the evidence developed is substantially the same as that offered at the first trial, the trial judge may appropriately instruct the jury that the tie-in itself has been established as a matter of law, and that the amount of commerce affected is "not insubstantial." On this aspect of the case, the issue for the jury is whether the Credit Corporation, in the language of *Northern Pacific Railway Co., et al.* v. *United States, supra*, had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product * * *." Admittedly this is a standard which must vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence (some of which we have commented upon), free from the limitations of an arbitrary definition.

Appendix B

Listing of Legal Commentaries Devoted to This Court's Prior Decision in This Case

Baker, *Another Look At Franchise Tie-Ins After Texaco and Fortner,* 14 Antitrust Bull. 767 (1969)

Dam, *Fortner Enterprises* v. *United States Steel: "Neither A Borrower, Nor A Lender Be,"* 1969 Supreme Court Rev. 1

Comment, *Anti-Trust Tying Arrangements,* 9 Washburn L. J. 282 (1970)

Handler, *Antitrust: 1969,* 55 Cornell L. Rev. 161 (1970)

Nelson, *Tying Arrangements Reconsidered: A Review of Fortner Enterprises, Inc.* v. *U. S. Steel Corp., et al.,* 15 Antitrust Bull. 7 (1970)

Note, *Antitrust Law—Tying Agreements, The "Per Se" Rule, And Credit,* 23 Southwestern L. J. 907 (1969)

Note, *Antitrust Law—Tying Arrangements And Per Se Illegality,* 38 U. of Mo. at Kansas City L. R. 483 (1970)

Note, *Antitrust Laws—When A Not Insubstantial Portion Of Interstate Commerce Is Affected, The Conditioning Of Uniquely Advantageous Financing Terms Upon The Purchase Of Prefabricated Houses Raises A Jury Question On The Issue Of An Illegal Tying Arrangement,* 47 Texas L. Rev. 1449 (1969)

Note, *Antitrust—Tying Arrangements—A Re-examination Of The Per Se Rule And Identification Of Tying Arrangements,* 48 N. Carolina L. Rev. 309 (1970)

Note, *Corporate Tying Arrangements Illegal Per Se When the Tying Product Is "Unique" and the Dollar-Volume Of The Tied Product Is Not Merely DeMinimis,* 21 Syracuse L. Rev. 245 (1969)

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Note, *Credit As A Tying Product*, 69 Col. L. Rev. 1435 (1969)

Note, *The Logic of Foreclosure: Tie-In Doctrine After Fortner* v. *U. S. Steel*, 79 Yale L. J. 86 (1969)

Note, *Per Se Illegality Of Tying Arrangements Involving Credit Financing*, 50 Boston U. L. Rev. 125 (1970)

Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 235 (1969)

Panel Discussion, *Recent Trends In Supreme Court Antitrust Decisions: Commentary—Past, Present and Future*, 38 Antitrust L. J. 602, 614 (1969)

Tingle, *Financial Assistance As A Tying Product—Fortner Enterprises* v. *U. S. Steel*, 25 Business Lawyer 121 (1969)